


MESSAGE FROM GENERAL COUNSEL

To: All Brewers of Pennsylvania Members
From: Theodore J. Zeller III, Esquire 
Date: September 19, 2019
RE: **For Immediate Release: New Tax Effective October 1, 2019**

Starting for sales October 1, 2019, Pennsylvania breweries, taprooms (storage locations) and couplets (breweries with a Retail License or “GP License”) must collect a “use tax” on all of your direct sales to consumers, whether those sales are for on or off-premise consumption. This new tax replaces a more onerous tax which the Brewers of Pennsylvania successfully delayed. For most of the Commonwealth, the new tax will result in you reporting and paying 1½% of your retail sales to consumers to the Department of Revenue. Additional local taxes are due in Philadelphia and Allegheny Counties at the rate of 2% and 1% of 25% of the retail sale. The important points are as follows:

- **You cannot pass this tax on to the consumer**, i.e., while you are free to raise your price you cannot show this tax on your receipt to the consumer.
- The tax is applied by multiplying 25% of the total retail sale and, then, multiplied by your applicable local Sales Tax: 6% for most of the Commonwealth, 8% in Philadelphia, and 7% in Allegheny.
- I urge you to read the attachments which are the official Tax Bulletin issued by the Department of Revenue, a draft of the Brewers of Pennsylvania and Department of Revenue collaborative FAQ which will soon be posted on the Department of Revenue website and a simple “how to” inputted on a Sales and Use Tax Form which you will be filing to report and pay this tax (it is the same form as you currently use with additional instructions in the margin).

If anyone has any questions, we urge you to participate in the legal calls with General Counsel. The next one is scheduled for Wednesday, December 4, 2019 at 10:00 AM and simply contact rschultz@norris-law.com to note your participation. In the interim, you can email me at tzeller@norris-law.com.

TJZ/mlp
attachments

TAX BULLETIN
SALES AND USE TAX 2019-02

Taxation of the sale of malt or brewed beverages in Pennsylvania by manufacturers

Issued: July 16, 2019
Effective Date: October 1, 2019

The Department of Revenue (“Department”) issues this Sales and Use Tax Bulletin to inform taxpayers engaged in the manufacture and sale of malt or brewed beverages of a change in law. This guidance only applies to manufacturers of malt or brewed beverages selling their own malt or brewed beverages directly to the ultimate consumer. It does not apply to any other sales made by manufacturers, including, but not limited to, food, merchandise, malt or brewed beverages made by another manufacturer, or any other items. The guidance in this Tax Bulletin will be applied prospectively only, beginning with the effective date above.

Section I provides a general overview of the Sales and Use Tax law as it applies to manufacturers. Section II provides examples of the application of the Sales and Use Tax law.

I. General Overview

Article II of Pennsylvania’s Tax Reform Code of 1971 (“TRC”), 72 P.S. §§ 7201-7282, as amended, imposes a tax of six percent (6%) of the purchase price on the sale at retail or use of tangible personal property and certain enumerated services within this Commonwealth. 72 P.S. § 7202(a). The tax is imposed upon the purchaser, that is, the customer, but the tax is collected by the vendor and remitted to the Commonwealth. Id. Allegheny County and Philadelphia County also impose an additional one percent or two percent, respectively, on the state Sales or Use Tax base.

The definition of “sale at retail” includes the sale of malt or brewed beverages by a manufacturer to any person for any purpose, except sales to an importing distributor or distributor. 72 P.S. § 7201(k)(10). Act 13 of 2019 changed the Sales Tax as it applies to sales of malt or brewed beverages made by manufacturers directly to consumers for on or off premises consumption to a Use Tax on manufacturers for any malt or brewed beverages sold directly to the ultimate consumer for consumption on or off premises. Act 13 also sets the Use Tax base at 25% of the retail price of the malt or brewed beverage sold for consumption on or off premises.

Therefore, pursuant to Act 13, a manufacturer is required to collect Sales Tax or remit Use Tax on its sales of malt or brewed beverages in the following manner:

- A manufacturer must collect Sales Tax on the entire purchase price for any sales made directly to a retail dispenser or retail liquor licensee¹ or another manufacturer². The manufacturer does not reduce the purchase price to calculate the Sales Tax due.
- A manufacturer must remit Use Tax on 25% of the retail price for any sales of its own malt or brewed beverages made to the ultimate consumer for consumption on or off premises.

The changes in the law made by Act 13 apply only to sales made by a manufacturer of malt or brewed beverages under its manufacturing license directly to the ultimate consumer for consumption on or off premises. A manufacturing license includes a brewery license (G), a brewery storage license (GS), and a brew pub license (GP). If a manufacturer sells its malt or brewed beverages to a separate legal entity, including a related entity that holds another license such as a restaurant license, the manufacturer must charge and collect the Commonwealth's Sales Tax on the full consideration paid for the malt or brewed beverages.

II. Application of the tax

The following examples demonstrate how a manufacturer must either charge and remit Sales Tax or pay Use Tax to the Commonwealth.

Example 1

Brew Co. is licensed as a manufacturer (G license) of malt or brewed beverages by the Pennsylvania Liquor Control Board ("PLCB"). Brew Co. holds no other licenses from the PLCB. In the normal course of business, Brew Co. manufactures and sells malt or brewed beverages to a variety of customers, including importing distributors, holders of restaurant liquor licenses, and consumers at its onsite taproom. Brew Co. makes the following sales of its own malt or brewed beverages:

1. Twenty cases, five one-half barrel kegs, and ten one-sixth barrel kegs to XYZ, Inc., an importing distributor. Brew Co. charges XYZ a total of \$2,500 for all of the products.
2. Four cases and two one-sixth barrels to DEF, LLC, an establishment holding a restaurant liquor license. Brew Co. charges DEF a total of \$320.
3. Two hundred pints, 25 crows, ten cases, and two one-sixth barrels to various individual customers who will be the ultimate consumer of the products for consumption on or off premises. Brew Co. charges its customers a total of \$1,000.

¹ For purposes of the Sales and Use Tax law, a retail dispenser or retail liquor licensee includes, but is not limited to, licenses such as a restaurant (R) license, hotel (H) license, eating place retail dispenser (E) license, or any similar license where the licensee is authorized to sell alcohol for consumption on premises or off premises in quantities not to exceed 192 oz. in a single transaction.

² For purposes of this bulletin, sales to another manufacturer includes brewery (G, GS or GP) licensees, limited winery (LK) licensees, and limited distillery (AL) licensees.

In transaction number 1, Brew Co. does not need to charge and separately state the Commonwealth's Sales Tax on an invoice provided to XYZ. Sales from a manufacturer to an importing distributor or distributor are exempt from the sales tax.³

In transaction number 2, Brew Co. must charge and separately state the Commonwealth's Sales Tax on an invoice provided to DEF. The total Sales Tax that must be collected by Brew Co. is \$19.20 (\$320 x 6%). If Brew Co. is located in either Allegheny or Philadelphia County, it must also collect the local sales tax on the entire purchase price. DEF does not charge sales tax on its sale of the malt or brewed beverages to its customers.

In transaction number 3, Brew Co. must remit Use Tax on the malt or brewed beverages sold from its taproom directly to the ultimate consumer for consumption on or off premises. Since this is a Use Tax and the duty to pay and remit the tax is on the manufacturer, the manufacturer cannot separately state the tax on a receipt provided to the ultimate consumer. Instead, the manufacturer must remit the Use Tax when it files its Sales and Use Tax return with the Department. The manufacturer must calculate its Use Tax liability in the following manner:

Total of Retail Sales:	\$1,000
Purchase Price for Use Tax Purpose (Total Retail Sales x 25%):	\$250
Use Tax Due (Purchase Price x 6%):	<u>\$15</u>

If Brew Co. is located in either Allegheny or Philadelphia County, it must also remit the local use tax on the purchase price. The results above will be the same whether Brew Co. makes the sales from its brewery facility, brewery storage facility, or brew pub facility.

Example 2

In addition to the facts in Example 1, Brew Co. purchases five one-sixth barrel kegs of malt or brewed beverages from LNM Brewing, Inc., another PLCB licensed manufacturer (G license), to sell for consumption on premises. Brew Co. pays LNM Brewing \$125 per one-sixth barrel keg. Brew Co. also purchases two twelve-bottle cases of wine at \$15 per bottle from a PLCB licensed limited winery (LK license). Finally, Brew Co. purchases one six-bottle case of whiskey at \$25 per bottle and one six-bottle case of vodka at \$20 per bottle from a PLCB licensed limited Distillery (AL License).

Each manufacturer that sells the products listed above to Brew Co. must charge and collect the Commonwealth's 6% Sales Tax on the entire purchase price paid by Brew Co.⁴

³ Note that when a distributor sells malt or brewed beverages to retail licensees or individual consumers the distributor must charge and separately state the Commonwealth's sales tax on the full purchase price.

⁴ If any of the other manufacturers are located in either Allegheny or Philadelphia County, they must also collect the local sales tax on the purchase price. If the other manufacturers are not located in either Allegheny or Philadelphia County but Brew Co. is, then Brew Co. must remit the local use tax on the purchase price.



<u>Seller</u>	<u>Entire Purchase Price</u>	<u>Total Tax Due</u>
LNM Brewery	\$625	\$37.50
Limited Winery	\$180	\$10.80
Limited Distillery	\$270	\$16.20

Brew Co. should not charge its customers Sales Tax when it sells the various products from other manufacturers for consumption on its premises.

On behalf of the Brewers of Pennsylvania, again, thank you for your time last Wednesday in which we discussed the implementation of HB262 (Act 13 of 2019 sometimes referred to as the “New Tax Law”) which has been signed into law by Governor Wolf. As we discussed in the meeting, I thought it would be appropriate to propose some questions to the Department of Revenue and we could jointly develop a frequently asked question (FAQ) document or otherwise assist the Department of Revenue in drafting a bulletin so we can ensure the most efficient implementation of the new tax upon manufacturers. In light of the above, I propose to you the following questions.

1. Is the New Tax Law tax a sales tax or use tax and can the brewery “pass on” the tax to the ultimate consumer on the sales receipt at retail?

Answer: The tax is not a sales tax, but a use tax imposed upon a manufacturer for its use of its own products on the sale to the ultimate consumer. Since this is a use tax, the manufacturer cannot separately state and charge a sales tax on the sales receipt for the purchase of any malt or brewed beverages. This is addressed in Sales and Use Tax Bulletin 2019-02.

While a business may add various charges and line items to a receipt, a business may not separately state and charge “sales tax” when it is not actually a sales tax. Section 268(b)(1) of the Tax Reform Code makes it a crime to, among other things, “provide any person with a false statement as to the payment of tax with respect to particular tangible personal property or said services...”. 72 P.S. § 7268.

Since the tax is on the manufacturer, it is a false statement to “pass” the tax onto the customer by adding a “sales tax” line to the receipt. Additionally, charges that represent a reimbursement of a vendor’s cost are included in taxable purchase price and subject to tax. 72 P.S. § 7201(g)(1); 61 Pa. Code § 33.2. Therefore any charge representing manufacturer costs added to a receipt by a manufacturer will be themselves subject to tax.

Furthermore, if a manufacturer adds a line called “sales tax” to customer receipts and is subsequently audited, the auditor will request proof that the manufacturer was: 1) paying the use tax it is required to pay under 202(h)(4); and 2) any amounts listed as “sales tax” on the receipt were remitted to the Commonwealth. This second point is important, as the tax is not on the consumer, but the manufacturer. Therefore, if a consumer has a receipt showing sales tax charged and collected, the customer can file a Petition for Refund at the Board of Appeals. The Board would be obligated to refund the tax to the consumer.

2. In reporting the tax, I assume that premises record 100% of the retail sale amount of a brewery’s sale of beer to a consumer in Line 1 of the “Sales, Use, and Hotel Occupancy Tax (form PA-3).” Depending upon your answer to the above can you clarify whether we would report the amount of taxable sale on Line 2 or as a use tax on Line 6?

Answer: Line 1 of the sales tax return, "Total Gross Sales, Rentals, Services", should reflect the total amount of gross sales from the manufacturer for that particular tax period, including sales of the manufacturer's own malt or brewed beverages to the ultimate consumer for on or off premises consumption.

Line 2 of the sales tax return, "Net Taxable Sales", should reflect the amount of sales in which Pennsylvania sales tax was charged and collected for that particular tax period. The amount referenced above for line 2 applies to sales by manufacturers, including but not limited to, food, merchandise, or any other items.

The calculated use tax on the sale of the manufacturer's own malt or brewed beverages to the ultimate consumer for consumption on or off premises, should be reflected on line 6 "Use Tax Due" of the sales tax return for that particular period.

All amounts reported on the sales tax return are subject to verification and audit by the department. You must maintain your books and records for at least four (4) years after filing, as evidence of the information you reported on your PA returns.

3. Does the reporting of this tax require the brewery taxpayer to change the frequency of its sales and use tax filings, i.e. will it change whether the taxpayer is a monthly or quarterly filer?

Answer: No, the brewery taxpayer should continue to file at their current frequency. If a change is needed based on the amount of tax reported, the Department of Revenue will send a notice of a change in the filing frequency to the brewery taxpayer.

4. Can you please describe in detail what records are to be maintained for audits to verify that a brewery has collected the appropriate amount of tax, i.e. are records required to reflect the calculation of 25% of the retail sale multiplied by 6% sales/use tax plus any additional taxes due Philadelphia and Allegheny Counties?

Answer: Records needed for audit will include the transactional listing of all sales made which identifies the individual category of sale (detailed POS reports or daily register tapes), daily summary of sales reports or daily Z-tapes, monthly sales summaries by category, and the use tax worksheets used to determine the use tax base and computation of use tax due.

The Philadelphia or Allegheny County tax rate should also be applied to the use tax base, when applicable, to determine the local use tax to be reported on the return.

5. Are there any miscellaneous recommendations from the Department on record keeping or compliance with the New Tax Law? (Insert recommendation about having a separate key function for a brewery sale of its own products.)

Answer: The manufacturer must segregate the sales made to the ultimate consumer between the product they manufacture and the product that they purchase. This can be accomplished through the use of a point of sales (POS) system or a separate key on the cash register that can be summarized. The total sale of manufactured product sold to the ultimate consumer should be recorded and multiplied by 25% to determine the use tax base. The state tax rate should be applied to the use tax base to determine the use tax that should be included on line 6 of the sales and use tax return.

		Pennsylvania (5%)	Allegheny (1%)	Philadelphia (2%)
*1	Total Gross Sales, Rentals, Services			
*2	Net Taxable Sales			
3	Total Amount of Tax Due			
4	Discount <small>the timely filing discount cannot be applied.</small>	0.00	0.00	0.00
5	Net Tax Due	0.00	0.00	0.00
*6	Use Tax Due <small>What is Use Tax?</small>			
*7	E 911 Fee Due <small>What is e-911?</small>		0.00	0.00
8	E 911 Discount	0.00	0.00	0.00
9	E 911 Net Fee Due	0.00	0.00	0.00
10	Total Tax and Fee Due	0.00	0.00	0.00
*11	Credit <small>Do not enter Pre-payments.</small>			
12	Amount Due	0.00	0.00	0.00
13	Previous e-TIDES Payments		\$	0.00
14	Other Payments <small>For calculation purposes only.</small>		\$	0.00
15	Penalty & Interest <small>Penalty and Interest Calculator</small>		\$	0.00
	Total Payment Due		\$	0.00

→ In addition to other reportable sales, 100% of the retail sales of your malt or brewed products here (Line 1)

→ Do not include retail sales of your malt or brewed beverages to consumers here (Line 2)

→ Multiply the total sales of your own product to consumers by 25%, and then, your applicable sales tax rate (Philadelphia 8%, Allegheny 7%, and all others 6%) (Line 6)